IN THE STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

WPS ENERGY SERVICES, INC.	:	
	:	
APPLICATION FOR CERTIFICATE OF	:	Docket No. 00-0199
SERVICE AUTHORITY UNDER SECTION	:	(Reopened)
16-115 OF THE PUBLIC UTILITIES ACT	:	

WPS ENERGY SERVICES, INC., BRIEF ON REOPENING

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I. INTRODUCTION - WPS Energy Services, Inc., ("WPS-ESI" or "Applicant"), filed an Application for Certification as an Alternative Retail Electric Supplier ("ARES") pursuant to Section 16-115 of the Public Utilities Act ("PUA" or "Act") (220 ILCS 5/16-115) and 83 Ill.Adm.Code 451 ("Part 451"), on March 2, 2000. Notice of the Application was published. Petitions for Leave to Intervene were filed and were granted. On April 18, 2000, the Illinois Commerce Commission ("Commission") issued a Final Order ("Final Order") granting WPS-ESI a Certificate of Service Authority as an ARES. An Application for Rehearing was filed and granted and was subsequently withdrawn. (Tr., June 15, 2000 at 6). WPS-ESI has a property interest in the Certificate subject to due process protection. See Quantum Pipeline Company et. al., v. Illinois Commerce Commission, 304 Ill.App.3rd 310, 709 N.E.2d 950 (Ill.App. 1999).

Approximately eleven months after the Final Order, the Commission, on its own motion, reopened this proceeding pursuant to an order dated March 16, 2001 ("Order on Reopening"). The Commission announced that it reopened this docket pursuant to Section 10-113 of the PUA (220 ILCS 5/10-113) and Section 200.900 of the Commission's Rules of Practice (83 Ill.Adm.Code 200.900). The Commission reopened the proceeding for the limited purpose of considering whether WPS-ESI meets the standards set forth in Section 16-115(d)(5) of the Act (the reciprocity provision). (Order on Reopening at 5 and 6). The IBEW, Illinois Energy Association, Illinois Retail Merchants Association, Citizens Utility Board, Representative Kurt Granberg, et. al., and Senator Steve Rauschenberger and Enron Energy Services, Inc., all intervened in this reopened procedure.

Pursuant to the Commissions Order on Reopening, the Staff reviewed their previous analysis and recommendation in Docket 00-0199. The specific issue evaluated was: Were there any other sets of assumptions which would assist the Commission in determining whether any of the four electric utilities, in whose service territories WPS-ESI sought to provide ARES service, could economically serve customers

in the WPSC service territory?

The Staff re-evaluated the Power Purchase Option Comparison, in which, WPS-ESI compared the Load Weighted Average Market Value rate (PPO) obtained from Commonwealth Edison's Rider PPO plus certain delivery components to the total electric rate WPSC industrial customers pay. In its Report filed March 23, 2001, ("Report") the Staff noted that WPSC rates include both a demand charge and an energy charge, where as the PPO rates use only energy pricing. WPS-ESI in the original application controlled for this disparity in the rate-making methodologies of the PPO rates and the WPSC rates by presenting data based on an average customer profile. When re-evaluating the validity of WPS-ESI's original application, the Staff discarded the average customer scenario and sought to compare the WPSC rate for a single, hypothetical, low load factor customer, which is tailored to recover the costs specific to that customer, with PPO sourced power priced using a Load Weighted Average Market Value. Staff's analysis purported to show that Illinois utilities could serve hypothetical customers on the WPSC system with load factors of 30% or less. (During cross-examination Staff witness Larson stated that he had updated his "numbers" and the break even point in his analysis was not less than a 25% load factor customer. (Tr. 70).)

Subsequent to the reopening of this matter, the Commission affirmed its original interpretation of the reciprocity clause as applied in the Final Order for WPS-ESI. It rejected the same methodology for determining compliance with the reciprocity clause put forward by the Staff in its Report here. Blackhawk Energy Service LLC, Dkt. 01-0174, Order April 6, 2001. (The "April 6, 2001 Order"). Staff witness Larson made it clear that but for the Commission's instruction, Staff would not have felt the need to revisit the original WPS-ESI certification. (Tr. 71-73). Under these circumstances and for the reasons described below the Commission should terminate or dismiss this proceeding, or in the alternative, reaffirm WPS-ESI's original certification.

II. FACTUAL CASE AND RESPONSE TO STAFF REPORT - WPS-ESI presented Mr. Chris

Matthiesen, Director of Energy Consulting at WPS-ESI as its expert witness in this proceeding in response to Staff witness Bruce Larson. Mr. Matthiesen sponsored WPS-ESI Exhibits 1, 2 and 3. The Exhibits sponsored by Mr. Matthiesen show his disagreement with the conclusions reached in Staff witness Larson's Report. WPS-ESI agreed with the Staff that there was no evidence that purchasing power and energy at the WPSC border is less expensive than transporting power and energy within any of the Illinois utilities' service territories and delivering it to WPSC's service territory. (WPS-ESI Ex. 1, Ex. A at 4). However, the Report does not demonstrate that power and energy can be reasonably and economically provided to Wisconsin Public Service Company's ("WPSC") retail customers by the Illinois utilities described in that report. (WPS-ESI Ex. 1 at 1).

WPS-ESI argues there are two flaws in the Staff's analysis concerning the economic deliverability of power and energy to serve WPSC customers with a demand of one megawatt or greater. First, the PPO comparison is invalid when used to compare a class based rate that aggregates the load factors of a given class to a rate that is calculated based on the actual cost serve an individual customer, including load factor. Second, even it one accepted the basic premise that underlies the Staff's analysis, when applied using actual customer data for customers in the WPSC service territory, the Illinois utilities are not able to economically serve customers with a demand of 1 MW or greater in the WPSC territory.

WPS-ESI argues that comparing two different rate-making methodologies in the manner the Staff proposes is flawed. The PPO rates were used by WPS-ESI as a reasonably proxy for the price at which Commonwealth Edison ("CE") can sell its generation to prospective customers in Wisconsin because it is the price at which CE can offer power and energy to customers within its own service territory. (See WPS-ESI Original Application). WPS-ESI maintains this position provided certain characteristics are considered. One of those characteristics is that the PPO pricing is calculated based on an average customer within a rate class. The rate classes are set by demand, and are not controlled by load factor and

consequently, customers with higher load factors subsidize the pricing for customers with lower load factor customers. The PPO is not a reasonable proxy for wholesale pricing, unless an "average customer" type analysis is pursued, because it fails to account for the load factor variable which has an enormous impact on wholesale pricing. Recognizing this characteristic of the PPO pricing methodology WPS-ESI compared the PPO pricing to an average customer in the WPSC territory with matching characteristics in its original application. (WPS-ESI Ex. 1, Ex. A at 1-2).

The Staff, however, sought to do a hypothetical customer specific - tailored analysis. Staff witness Larson admitted he had no information about actual customers on the WPSC system and his analysis was entirely hypothetical. (Tr. 75-76). In the Response to the Staff Report. WPS-ESI modified the PPO figures to reflect a more realistic market picture of how wholesale pricing changes for low load factor customers. Given forty-eight hours to prepare a response, WPS-ESI sought to conduct an informal survey to provide an illustration of how the actual wholesale electric market treats customers with varying load factors differently. All of those who responded to the informal survey confirmed that the cost to serve a low load factor customer is higher than to serve the same customer with a higher load factor. The incremental cost varied from 15% to 47% according to the survey. (WPS-ESI Ex. 1, Ex. A at 1-2).

In response to Staff's criticism of the "informal" survey, he stated that the expedited nature of the process in this case made it impossible to conduct a formal survey. (WPS-ESI Ex. 2 at 2). He stated that six entities responded to the question: "By how much would you increase your price for wholesale supply to serve a 30% load factor customer over your price to serve an 80% load factor customer?" Two Illinois utilities, an Indiana utility, a Wisconsin utility, a retail electric provider operating in the Northeast and a Michigan utility. (WPS-ESI Ex. 2 at 2). Based on these responses WPS-ESI indicated that it would be substantially more costly to serve the 30% load factor customer than the 80% load factor customer. Even Staff witness Larson agreed that low load factor customers would be more likely to incur greater imbalance

charges than higher load factor customers. (Tr. 46-48).

WPS-ESI's position that it is more costly to serve lower load factor customers than higher load factor customers is supported by the analysis conducted by Blackhawk Energy Services LLC, in Docket 01-0174 and accepted by the Commission in its April 6, 2001 Order in that docket. Blackhawk Energy, in their application for certification, presented essentially the same argument WPS-ESI does here. "Blackhawk claimed, contrary to the assertions in the Staff Report, that the cost to purchase power to supply a customer with a load factor of 80% is much lower on a $/MWh basis than the cost to purchase power for the same size customer with a load factor of 30%. Blackhawk stated that it appeared that one of the reasons for the inaccurate conclusion contained in the Staff Report is Staff's mistaken and improper reliance upon average prices to calculate costs for customers with specific load factors. (April 6, 2001 Order at 11). The Commission noted: " Blackhawk indicates that the market values contained in ComEd's PPO tariff are based upon average load factors for the customer class. Blackhawk contends that the prices in the PPO tariff do not represent the actual costs that a wholesale purchase would incur for customers with specific load factors." (April 6, 2001 Order at 11).

In Blackhawk, the Commission found the Staff's basic premise for this analysis, "that wholesale power costs do not vary with load factors since a demand charge is required for retail power costs but is not required for wholesale power costs" in error (April 6, 2001, Order at 22). More specifically, the Commission found that, "the cost to purchase power to supply a customer with a load factor 80% is much lower on a $/MWh basis than the cost to purchase power for the same size customer with a load factor of 30%." (April 6, 2001 Order at 23). Finally, the Commission concludes, " At least one of the reasons for the inaccurate conclusion contained in the Staff Report is the reliance on average prices to calculate costs for customers with specific load factors." (April 6, 2001 Order at 23).

Mr. Matthiesen also responded to Staff's criticism that incremental costs should have been applied

to the cost of power and energy, and not the total cost to serve. This criticism is incorrect for two reasons. First, the question asked in the WPS-ESI informal survey sought the total incremental cost to serve the customer and did not seek to identify that portion of the cost that would be applied to the cost of power and energy alone. Second, whether the additional cost is booked by the supplier as an energy cost, demand, transmission or other services, is irrelevant to the analysis. It was the ultimate cost to serve a customer on the WPSC system that prompted the Staff to reconsider the impact of the "demand plus power and energy" pricing offered by WPSC and the power and energy only pricing available through the PPO. (WPS-ESI Ex. 2 at 1-2).

Mr. Matthiesen responded to Staff's criticism that it was "absurd" for WPS-ESI to conclude that an Illinois utility could not serve a WPSC customer currently charged $51.3 per megawatt hour when the cost to an Illinois utility was $51.3 per megawatt hours. He noted it was not WPS-ESI's conclusion that an Illinois utility could not serve the customer, rather the customer could not be served economically by the Illinois utility. That conclusion remains valid because the PPO pricing used in the analysis and in the Staff's Report is the market value index plus transmission costs derived from the OATT. He clarified that the $51.3 per megawatt hour represents the costs of the Illinois utility, not a price to the proposed customer. In other words, the $51.3 per megawatt hour cost to the Illinois utility does not include any margin. By contrast, the $51.3 per megawatt hour price charged by WPSC does include a margin. (WPS-ESI Ex. 2 at 2).

In further response to the Staff, Mr. Matthiesen applied data that represents the usage profiles of the actual WPSC industrial customer base with a demand of a megawatt or more to the calculations suggested by the Staff. He demonstrated that even using the Staff's analytical approach, the Illinois utilities cannot economically serve any one customer in the WPSC territory with demand of a megawatt or more. WPS-ESI is certified to serve only customers with demands of 1 MW or more. Mr. Matthiesen offered

Exhibit A to WPS-ESI Exhibit 2 which provided the actual dollars per megawatt hour pricing for every WPSC customer with a demand of 1 megawatt or more and compares those dollars per megawatt hour with the pricing available through the PPO. The document itself was prepared using the PPO-market based rates as used in Staff's Report of March 23, 2001 (and in WPS-ESI's original Application for Certification in this proceeding). The analysis shows the actual price per megawatt hour for WPSC 1 megawatt and over customers. The analysis, Exhibit A, demonstrates that not one WPSC customer uses electricity in such a way as to render service by an Illinois utility economic. (WPS-ESI Ex. 2 at 3-4, Ex. A).

Subsequently, based on an informational filing made by Commonwealth Edison on April 2, 2000, Mr. Matthiesen updated Exhibit A by presenting a new Exhibit B based on the new (and increased) PPO prices announced by ComEd. (WPS-ESI Ex. 3). This updated analysis was exactly the same as the analysis conducted in Exhibit A attached to WPS-ESI Exhibit 2 and also contained a comparison of the differential between original Exhibit A (WPS-ESI Exhibit 2) and the new Exhibit B (WPS-ESI Exhibit 3). This further confirms Mr. Matthiesen's original conclusion that not one WPSC customer uses electricity in such a way as to render service by an Illinois utility economical.

The record also establishes that Staff witness Larson was involved in evaluating other ARES applications with regard to the reciprocity issue. Based on his analysis of those three applications (including the original WPS-ESI application), in each case he concluded from his analysis that the applicant (including WPS-ESI) had complied with the reciprocity clause. He testified that if he had disagreed with the analysis conducted by those three applicants (including WPS-ESI), he would have said so at the time and he did not feel as if he was prevented in any way from saying so. He believed the analysis conducted by each of the three applicants (including WPS-ESI) was a valid analysis which demonstrated compliance with Section 16-115(d)(5). He further testified that he did not feel inhibited in identifying other valid approaches to determining compliance with Section 16-115(d)(5). If there had been such an approach, he

would have recommended and used it. Finally, he testified that he would not have felt the need to revisit his original review of these three applications (including the WPS-ESI application), but for the Commission's Order on Reopening directing him to do so. (Tr. 71-73). Thus, the Staff witness primarily responsible for determining compliance with the reciprocity clause would not contest, but for the Commission's Order on Reopening that he consider other possibilities, the validity or the appropriateness of the original analysis conducted by WPS-ESI in this proceeding.

III. LEGAL ARGUMENTS

A . Section 16-115(d)(5) - Reciprocity Clause - In its Order on Reopening, the Commission indicated that one of the reasons it was reopening this proceeding was to revisit its interpretation of Section 16-115(d)(5). Prior to that time, the Commission had implicitly or explicitly concluded that in applying the reciprocity clause "the question is whether electric power and energy 'can be physically and economically delivered' to the service area of applicant's affiliates by Illinois utilities in whose service territories the applicant's plan to offer service." (Final Order at 9; See also Duke Solutions, Inc., Dkt. 99-0440, Final Order October 19, 1999, at 3, 1999 Ill.PUC Lexis 745). Indeed, in its order granting Ameren Energy Marketing Company a certificate of service authority as an ARES, the Commission stated:

> "Under the reciprocity provisions of Section 16-115(d)(5), the Commission is charged to determine (1) what constitutes physical and economic delivery; (2) what constitutes a 'defined geographic area'; and (3) whether the reciprocal delivery services are 'reasonably comparable'". (Order Dkt. 00-0486, August 15, 2000 at 5).

Thus, the Commission has consistently interpreted and applied the reciprocity provisions in cases involving applications for certification of an ARES on a historical basis.

Subsequent to the Order on Reopening in this cause, the Commission has again affirmed its original interpretation of the application of the reciprocity clause in its April 6, 2001 Order in Blackhawk Energy Services, LLC, Dkt. 01-0174. There, the Commission was required to review the position of certain intervenors that Section 16-115(d)(5) absolutely barred the issuance of an ARES certificate if the ARES

applicant or its corporate affiliate did not provide delivery services comparable to those offered by Illinois utilities. In rejecting this position, the Commission stated:

> "The Commission rejects the Joint Intervenors' and the IBEW's position since it is contrary to the plain language of Section 16-115(d)(5). Joint Intervenors' and IBEW's interpretation would render meaningless the qualifying term 'physically and economically delivered'." (Order at 21)

Likewise, in the case at bar, interpretations have been proposed by other intervenors which would render meaningless the qualifying term "physically and economically delivered". (Rep. Granberg, et. al., Comments at 3-4). In addition, the Staff's Report is based upon the assumption that physical delivery is not necessary. Staff witness Larson implied that under the new interpretation of Section 16-115(d)(5) (assumed in the Staff's analysis) an affiliate of a Hawaiian utility would not be able to compete in Illinois if an Illinois utility could buy power wholesale in Hawaii and resell same to Hawaiian retail customers. (Tr. 73-74).

The law and fundamental fairness require that the Commission continue to apply a consistent, and correct, interpretation of Section 16-115(d)(5) to WPS-ESI. The Commission cannot fairly apply a different interpretation of Section 16-115(d)(5) to WPS-ESI than that which has been applied previously to Duke Energy Solutions, Inc., WPS-ESI (in the original proceeding), Ameren Energy Marketing Company (prior to reopening) and to Blackhawk Energy since reopening in this proceeding. Further, certain intervenors and the IBEW make arguments similar to, or the same as, the arguments made by the IBEW and Joint Intervenors in the Blackhawk Energy case. Essentially they ask the Commission to ignore the phrase "physically and economically deliver" contained in Section 16-115(d)(5). However, "[t]he Commission may not define a portion of the Act in a way that conflicts with a specific directive contained in the Act." Illinois Bell Telephone Co. v. Illinois Commerce Commission, 283 Ill.App.3d 188, 669 N.E.2d 919, 933 (Ill.App. 1996). Therefore, the Commission cannot define the reciprocity clause in a way that conflicts with the specific language in that clause. That language specifically provides if the

Commission finds that power and energy cannot be physically and economically delivered by Illinois utilities to the T&D system of the applicant or its affiliate, then the applicant may be certified regardless of whether the affiliate provides delivery services comparable to those offered by Illinois utilities. Thus, the Commission's interpretation in the Blackhawk Energy case and the prior WPS-ESI case, as well as other cases involving applications for ARES status, are consistent with the law.

WPS-ESI, and the Commission, are not alone in their interpretation of Section 16-115(d)(5). Senator Rauschenberger, as party intervenor in this proceeding, also stated that Rep. Granberg, et. al., ignored the words "physically and economically delivered". (Sen. Rauschenberger Comments at 2). In his comments Senator Rauschenberger argued:

> "It would make no sense to apply the reciprocity provision with respect to denial of ARES certification an affiliate of a utility in a location that could not be physically served by power and energy from the Illinois utility. Examples of such situations might include an ARES affiliate of a distribution utility in a foreign country or in Texas. In neither case could an Illinois utility physically deliver power and energy. Therefore, such an applicant would still be in full compliance with the reciprocity provision in the Act. Similarly, the Act requires consideration by the Commission of whether a given Illinois utility could not economically serve even if it could do so physically." (Sen. Rauschenberger Comments at 2-3).[1]

Because the Commission has consistently interpreted and applied the reciprocity clause in a manner which allows the issuance of a certificate of service to an applicant who demonstrates that power and energy cannot be physically and economically delivered to its service territory or the service territory of its affiliate; because the Commission's interpretation is consistent with the clear language of the reciprocity clause itself, and, because the Commission's interpretation is consistent with the rules of statutory construction, the Commission should continue to so interpret and apply the reciprocity clause to WPS-ESI in this proceeding.

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[1]WPS-ESI believes that Senator Rauschenberger's comments constitute argument, not evidence in this proceeding. It absolutely agrees with his comments/arguments in response to the comments/arguments of Rep. Granberg, et. al., which are likewise not "evidence". (See argument below)

B. Section 10-113 of the Act Does Not Provide Authority to Reopen - When the Commission entered its Order on Reopening, it did so relying upon its perceived authority under Section 10-113 of the Act. (Order on Reopening at 4). Section 10-113 specifically applies to public utilities. WPS-ESI is not a public utility; it is an ARES. Section 3-105 of the Act defines a public utility, and specifically excludes from the definition of public utility "alternative retail electric suppliers as defined in XVI". (220 ILCS 5/3-105(c)(9)). Therefore, Section 10-113 does not apply to WPS-ESI. The Commission cannot deviate from the plain and unambiguous reading of the statute. In Re: Marriage of Burgess, 189 Ill.2d 270, 725 N.E.2d 1266, 1270-1271 (2000).

The Commission's authority over ARES is not found in Article X of the Act, it is found in Sections 16-115, 16-115A, and 16-115B of Article XVI of the Act. (220 ILCS 5/16-115, 16-115A, and 16-115B). Section 16-115 establishes the requirements for ARES certification. Section 16-115A outlines the obligations of an ARES, and Section 16-115B provides for the Commission's oversight of services provided by ARES.

Section 16-115B does provide the Commission with authority, after notice and hearing held on complaint or on its own motion, to take action against an ARES for any violation of or non-conformance with the provisions of Sections16-115 or 16-115A. The Commission may revoke or suspend the certificate of service authority of an ARES for substantial or repeated violations of or non-conformance with the provisions of Sections 16-115 or 16-115A. (220 ILCS 5/16-115B(b)). The Order on Reopening fails to establish that WPS-ESI violated or failed to conform to the provisions of Sections 16-115 or 16-115A. Nor does that Order indicate WPS-ESI has been in substantial or repeated violations of or non-conformances with the provisions of these sections.

In conclusion, the Commission's authority over an ARES is described in Sections 16-115, 16-115A and 16-115B. There is nothing in Article X of the Act that would suggest or imply the Commission has

any authority over ARES pursuant to any of the provisions Article X, including Section 10-113. Therefore, the Commission cannot rely on Section 10-113 to reopen the WPS-ESI certification.

C. Section 200.900 Of The Commission's Rules Of Practice Does Not Provide Authority to Reopen - The Commission also cites to Section 200.900 of its Rules of Practice as justification for it reopening its proceeding to question WPS-ESI's certification. (Order on Reopening at 4). Section 200.900 governs the reopening of proceedings on the motion of the Commission.

WPS-ESI asserts Section 200.900 of the Rules of Practice do not in themselves allow the Commission to revisit the certification under these circumstances. The Commission must still point to enabling statutory authority that justifies its reconsideration of the certification. The Commission must comply with Section 16-115B and advise WPS-ESI in the manner required of any violation or non-conformance of the provisions in Sections 16-115 or 16-115A. This, the Commission has not done, and it cannot alter or change statutes i.e., Section 10-113, through its exercise of the power to make rules and regulations. Harton v. City of Chicago Department of Public Works, 234 Ill. Dec. 632, 703 N.E. 2d 493, 501-502 (Ill. App. 1998).

D. Response to Staff - The Staff filed its Response to WPS Energy Services, Inc., Motion to Set Aside Order Reopening Proceeding (Staff Response). The Staff Response is not persuasive. In response to WPS-ESI's claim that Section 10-113 is not applicable to ARES, Staff argues that Section 10-113 was enacted before the Customer Choice Law and therefore "...Section 10-113 of the Act makes no mention of the ARES." (Staff Response at ¶ 5). The Staff is correct. Therefore, Section 10-113 clearly does not apply to ARES. Staff also argues that to construe Section 10-113 as limiting its application to public utilities absurdly restricts, to public utilities only, the right to notice and an opportunity to be heard before the Commission takes action of the nature contemplated by 10-113(a). (Staff Response at ¶ 6). However, if Section 10-113 does not apply to ARES, the Commission cannot take the action contemplated.

The Staff "arguments" are inconsistent with the well known and applied principle that the plain and unambiguous reading of the statute should prevail. In Re: Marriage of Burgess, Supra. The fact is, there is nothing in Section 10-113 that would lead anyone to reasonably conclude it provides any amount of Commission authority over ARES. In addition, the Staff's implicit argument that unless the Commission can find authority under Section 10-113, the Commission would lack the ability to give notice to an ARES and conduct a hearing relating to its certificate of service authority is misleading and incorrect. Section 16-115B provides the Commission with such authority, after notice and hearing held on complaint or on the Commission's own motion, to take action against an ARES for any violation of or non-conformance with provisions of Sections 16-115 or 16-115A. (220 ILCS 5/16-115B).

Staff also argues that Section 200.900 of the Rules of Practice is devoid of any reference to the Commission's need to cite any violation by WPS-ESI of any statute, rule or regulation in order to reopen this docket. (Staff Response at ¶ 3). This is precisely the point WPS-ESI is making. Section 16-115B **does** require the Commission to in the context of a complaint or in the form of the motion, to charge WPS-ESI with any allegation of violation or non-conformance of Sections 16-115 or 16-115A. In effect, Staff argues the Commission should be able to do by rule what it cannot do by statute. Illinois courts have held "... an administrative agency may not use its rules and regulations to expand the scope of a piece of legislation to include requirements not found in the statute." Pierce Downer's Heritage Alliance v. Downers Grove, 302 Ill.App3d 286, 704 N.E.2d 898, 907 (Ill.App. 1998), citing Pekin Memorial Hospital v. Dept. of Public Aid, 273 Ill.App.3d 259, 653 N.E.2d 70 (1995).

E. The Commission's Order Is Tantamount To Illegal Rulemaking - In its Order on Reopening the Commission states it will revisit the intervention standards and reciprocity provision in Section 16-115(d). It does so despite the lack of any contrary judicial or Commission interpretation of Section 16-115(d)(5), or any claim that WPS-ESI is in violation of any provision in Sections 16-115 or 16-115A.

(The Commission recently affirmed its original interpretation of Section 16-115(d)(5) in Blackhawk Energy Services, Dkt. No. 01-0174.) It appears the Commission is intent in restating or changing the standard applicable to the reciprocity provision. The Commission stated:

> "The Commission's Order [2000 Order] implicitly adopted a construction of Section 16-115(d)(5), ... which is consistent with the construction urged by WPS...".
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> * * *
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> "The Commission is concerned that there may be in fact another reading of the language highlighted above that is more directly in line with the intent of the Illinois General Assembly. "
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> "...it is important to remember that the primary means for any prospective ARES to satisfy the reciprocity test is simply to offer delivery services within its service area which are reasonably comparable to those required of electric utilities under Article XVI of the Act. ...it is reasonable to believe that the General Assembly's overall intent in enacting Section 16-115(d)(5) was to ensure any entity which availed itself of the newly created business opportunities provides for the creation of similar opportunities to those it enjoys under the new law." (Order on Reopening at 2)

The Order on Reopening makes evident the Commission by its action intends to effectuate a change in 83 Ill. Adm. Code Part 451 by reconsidering the means by which an applicant would comply with Section 16-115(d)(5) namely: what is meant by "electric power and energy [that] can be physically and economically delivered by the electric utility or utilities from whose service area or areas the proposed service will be offered...". (Order on Reopening at 1-2). It would appear the Commission is now questioning the standards applied to the reciprocity provision. It is also clear the Commission's questioning of the standard is not specific to WPS-ESI.

To the extent the Commission now intends to effectuate a change in its certification rules, the Commission must abide by the procedural requirements.

The Illinois Administrative Procedure Act defines "rule" as follows:

> "Rule means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (ii) informal advisory rulings issued under Section 5-150, (iii) intra-agency memoranda or (iv) the prescription of standardized

forms." (5 ILCS 100/1-70)

Applying the definition of "rule" to the Order on Reopening and its ramifications, it is apparent the Commission is delving into a policy change of general applicability. The Commission cannot, though, consider policy changes in a reopened proceeding. Among other statutory requirements, the Commission must provide notice to the public of its intention to consider changes to its rule. (5 ILCS 100/5-40). Because there is no legitimate question the Commission is contemplating a new procedure or means by which evaluate the reciprocity provision, providing notice of its intent to change its policy vis-a-vis the Order on Reopening is inadequate and illegal.

The Commission also states it will consider permitting input from other entities other than the applicant in a certification proceeding. (Order on Reopening at 3-4). To the extent the Commission wishes to change a policy it did not announce or even follow in the case at bar, it must do so as a rulemaking.

The reasons or purpose for the rulemaking is quite obvious. Prospective ARES are entitled to know the standards and guidelines by which they must abide in order to be certified. These standards and guidelines cannot be determined on an ad hoc basis. The Commission reopened this proceeding to change the standard reciprocity and intervention procedures. It is inappropriate for the Commission to develop or change the standard reciprocity and intervention each time a prospective ARES seeks certification.

F. Possible Constitutional Challenge - The Commission is well aware of the arguments advanced by Blackhawk with respect to its contention that the reciprocity provision, Section 16-115(d)(5), will not withstand a constitutional challenge. Blackhawk advanced a number of arguments in this regard in its Brief on Exceptions. (Blackhawk Br. at 30-36; Blackhawk Energy Services, L.L.C, Dkt. No. 01-0174 (April 6, 2001). WPS-ESI will not repeat those arguments. If found unconstitutional, could lead to a court decision invalidating the Customer Choice Law. In fact, the Law Journal article cited by Rep. Granberg et al., State Electrical Restructuring: Are Retail Wheeling and Reciprocity Provisions Constitutional, 33 Ind.L.Rev. 631,

ultimately concludes reciprocity provisions are probably unconstitutional. (Id. 663). (WPS-ESI reserves the right to further argument as to the constitutionality of the reciprocity provision per the remaining schedule and in any brief on exceptions or application for rehearing that may be filed.)

Most of the major Illinois electric utilities have already divested themselves of their generating assets, and some utilities are reaping the benefits of transitional funding instruments. By and large, the Customer Choice Law was designed in part to allow the utilities to ready themselves for retail competition in the electric energy market, and they are well on their way in accomplishing these objectives. If the Customer Choice Law was subsequently set aside, because a portion of it was declared unconstitutional where would customers be? At the very least, customers would soon be subject to rates based on market prices in a market controlled by Illinois utilities, and their generating affiliates -- hardly what the General Assembly envisioned when it passed the law in 1997. A precipitous decision could well trigger this undesirable result.

G. Failure to Provide Procedural Due Process - WPS-ESI incorporates the arguments made in its Motion to Set Aside Order Reopening Proceeding dated March 28, 2001.

1. The Commission Failed To Comply With Section 16-115B - Section 16-115B provides that the Commission can take action against an ARES for any violation of or non-conformance with provisions of Sections 16-115 or 16-115A. In this respect, the Commission is required to provide notice and hearing, and is also required to make these charges or allegations of violations or non-conformance in the context of a complaint or on its own motion. This the Commission has not done.

The Commission's Order on Reopening comes about due to the whim and caprice of the Commission more than anything else. The Commission's Order on Reopening does not charge WPS-ESI with any wrongdoing or violation of the aforedescribed statutes. Instead, the Order on Reopening is replete with conjecture:

> "The Commission is concerned **that there may be in fact, another reading...**"
>
> * * *
>
> "The General Assembly **may well have believed** that a business entity which is affiliated with an electric public utility should not be allowed to purchase delivery services for electric power and energy..."
>
> * * *
>
> "The reciprocity requirement **might thus properly** apply in all instances accept those involving an affiliate of a utility..."
>
> * * *
>
> The Commission is concerned that **this may not be a correct construction** of the language decided."
>
> (Order on Reopening at 2 and 3)

Clearly, the statements above in the Order on Reopening do not comply with Section 16-115B. Hence, the Commission's failure to comply with the requirements in the statute and to force WPS-ESI into a hearing process is violative of WPS-ESI's due process rights.

2. <u>The Expedited Hearing Denied WPS-ESI Due Process</u> - The Commission decided this matter must proceed on an expedited basis. No reason or explanation is offered for an expedited hearing in the Order on Reopening. There was no appellate decision or court ruling that would suggest or imply the Commission's prior application of Section 16-115(d)(5) should result in a different determination. There were no factual statements offered by the Commission that WPS-ESI was in someway in violation of Sections 16-115 or 16-115A. There were no allegations that WPS-ESI was in non-conformance with the stated statutes.

WPS-ESI was forced into a hearing process and a schedule that was procedurally deficient in many ways:

- The Commission required the Staff to prepare a report, and gave the Staff seven (7) days in which to file the report. WPS-ESI, on the other hand, only had forty-eight (48) hours in which to prepare a response.

- The schedule put in place by the Hearing Examiner effectively precluded WPS-ESI from conducting appropriate discovery.
- The overall time constraints in the hearing effectively precluded WPS-ESI from fully and adequately preparing its case. The Staff Report was filed on March 23, 2001, and the culmination of the reopening was a "hearing" on April 5, 2001, a

grand total of nine (9) business days.

- Persons and parties were permitted to intervene contrary to the stated requirements of Section 16-115.

- WPS-ESI was not advised of the evidence in the record. WPS-ESI was denied the opportunity to cross examine "potential" adverse witnesses.

WPS-ESI was not advised of the evidence in the record. This is a contested case within the meaning of Section 10-101 of the Act. (Tr. 30). Therefore, all parties are entitled to respond and present evidence. (See 220 ILCS 5/10-101; 5 ILCS 5/1-30). Section 10-25 of the Illinois Administrative Procedures Act provides in pertinent part:

> "(a) In a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice...
>
> (b) An opportunity shall be afforded to all parties to be represented by legal counsel and to respond and present evidence and arguments." (5 ILCS 5/10-75(a), (b)))

A fair hearing requires an opportunity to be heard in a proceeding consistent with the nature and circumstances of the dispute, and provides for the right to cross-examine adverse witnesses. Goranson v. Department of Registration and Edison of the State of Illinois, 92 Ill. App. 3d 496, 415 N.E. 2d 1249, 1253 (Ill. App. 1980). Because WPS-ESI was denied the right to meaningfully respond to and present evidence, and denied a meaningful right to cross-examine adverse witnesses, a Commission decision on the merits would be void.

Not only does the Commission's Order on Reopening and ensuing hearing process violate the Administrative Procedures Act but it is also violative of the Commission's own Rules of Practice. WPS-ESI was denied the opportunity to cross-examine potential adverse witnesses in violation of 83 Ill. Adm. Code Part 200.625. Because WPS-ESI was denied the right to effectively pursue discovery, and denied adequate time to prepare its case and was effectively denied the right to prepare for cross-examination, in violation of 83 Ill.Adm.Code Part 200.340). In addition, the process here was essentially a paper hearing

conducted in violation of Section 200.525 (83 Ill.Adm.Code Part 200.525). This rule requires that all parties consent to a paper hearing. WPS-ESI did not so consent.

Because the Commission offers no explanation for an expedited proceeding, it must be that its decision to pursue a reconsideration of WPS-ESI's certification in the manner prescribed is a clear and direct abuse of its powers, and thus arbitrary and capricious. The Commission's powers must be exercised judiciously, and not arbitrarily, as occurred in the instant proceeding. Robert N. Niles, Inc. v. Illinois Pollution Control Board, 17 Ill. App. 3d 890, 308 N.E. 2d 640, 643 (Ill. App. 1974). When the Commission abuses its powers and acts arbitrarily and capriciously, a court of law will set aside any such decision. Cotovski v. Department of Registration and Education, 110 Ill. App. 3d 417, 442 N.E. 2d 520, 525 (Ill. App. 1982); City of Hurst v. Illinois Commerce Commission, 120 Ill. 3d 354, 458 N.E. 2d 568, 572-573 (Ill. App. 1983).

3. Persons And Parties Were Improperly Permitted To Intervene, And Submit Comments - Section 16- 115(b) requires the Commission to consider only the information submitted in the context of a "verified application and such other information as the applicant may submit." (220 ILCS 5/16-115(b)). No allowance is made for other parties or persons to intervene, and certainly not to present information to be considered by the Commission. The statute is quite clear in this regard; the only information to be considered is that being submitted by the applicant.

Section 16-111(g) does not support the Commission's decision to allow intervention. (Order on Reopening at 4). That Section applies to electric utilities, not ARES. Also unlike Section 16-115 which limits the Commission's determination to information provided by the ARES applicant, Section 16-111(g) does not limit the Commission's determination to information provided by the electric utility.

Not only is the intervention by parties and persons inappropriate, but so is the submission of the Staff Report. Again, Section 16-115(d) requires the Commission to grant an application based upon the

verified application and such other information as the applicant may submit. (220 ILCS 5/16-115(d)). The Staff Report, quite obviously, does not meet this description of information to be considered by the Commission.

Even if other parties properly submitted comments in this proceeding, the comments presented cannot be considered "evidence". The comments of Rep. Granberg, et. al., the Illinois Electric Association, Senator Rauschenberger and the IBEW constitute arguments in support of a certain interpretation of Section 16-115(d)(5). To the extent the Commission determines that the comments were properly filed in the first instance, these parties are certainly entitled to offer their opinion on the interpretation of this Section. However, their opinion does not constitute evidence. Illinois Courts have held that opinion evidence on questions of law should not be permitted and it would be reversible error to allow members of the General Assembly to testify as to legislative intent. City of Blooming v. Bloomington Township, (4th Dist. 1992) 233 Ill.App.3d 724, 599 N.E.2d 62, 69).

> "Construing legislative enactments is a unique, judicial function, and legislators and other involved in the legislative process ought not to be allowed to testify regarding the meaning of a statute. .... .
>
> * * * *
>
> Neither the disclosed, nor undisclosed intent of a legislator or lobbyist becomes law; only the bill as it reads when passed becomes law. Allowing tailored court testimony purporting to explain what the legislature meant to say is unacceptable and potentially dangerous." Id 69-70.

The Commission should give no evidentiary weight to the comments filed by various members of the legislature or other parties to this proceeding.

IV. CONCLUSION - For the reasons stated herein, this matter should be terminated or dismissed by the Commission, or in the alternative, the Commission should affirm its original interpretation of Section 16-115(d)(5) in this proceeding and affirm its determination that WPS-ESI was in compliance with the reciprocity clause.

Respectfully submitted,

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IN THE STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

WPS ENERGY SERVICES, INC.	:	
	:	
APPLICATION FOR CERTIFICATE OF	:	Docket No. 00-0199
SERVICE AUTHORITY UNDER SECTION	:	(Reopened)
16-115 OF THE PUBLIC UTILITIES ACT	:	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on this 12th day of April 2001, we have electronically filed with the Illinois Commerce Commission, WPS Energy Services' Initial Brief, along with Proof of Service thereon attached.

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PROOF OF SERVICE

STATE OF ILLINOIS :
: SS
COUNTY OF MADISON :

I, Eric Robertson, being an attorney admitted to practice in the State of Illinois and one of the attorneys for WPS Energy Services, Inc., herewith certify that I did on the 12th day of April, 2001, electronically file with the Illinois Commerce Commission, WPS Energy Services' Initial Brief, and serve upon the persons identified on the attached service list, both electronically and by depositing same in the United States Mail, in Granite City, Illinois with postage fully prepaid thereon.

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SUBSCRIBED AND SWORN to me, a Notary Public, on this 12th day of April, 2001.

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